92-1420

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL LINDER,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether trial counsel rendered ineffective assistance when he failed to proffer a viable, credible, and corroborated defense, namely, mistake of fact, Penal Code § 8.02; if so, a reasonable probability existed that the result of the proceeding would have been different, viz, the evidence would have been insufficient to sustain the State's burden of disproving Petitioner's defense of mistake of fact beyond a reasonable doubt. U.S.C. Const. Amends. 6 & 14.

Whether the evidence is insufficient to support the jury's implicit rejection of the affirmative defense herein, viz, [no] rational trier of fact could have found that the Petitioner failed to prove [his] defense of mistake of law by a preponderance of the evidence. U.S.C. Const. Amends. 5 & 14.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

THE OPINION BELOW

The State Court of Appeals, 10th District, Waco, Texas, affirmed the denial of a writ pursuant to Art. V, § 8, Texas Const. *Linder v. State*, 779 S.W.2d 520 (Tex.App.--Waco, 1989). It is reproduced as Appendix B. The Texas Court of Criminal Appeals refused review.

Because Petitioner's probation was terminated, a § 2254 writ would not lie, *Sinclair v. La.*, 679 F.2d 513 (5CA 1982).

The State Writ for Habeas Corpus was denied on November 4, 1992. The denial is reproduced as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The questions presented here include whether petitioner, a bail bond person, can rely upon Supreme Court case law, albeit a 100 years old, reinforced by several Texas prosecutional agencies, and Amends. 5, 6 and 14, to effect an arrest without being subject to state charges for kidnapping.

STATEMENT OF THE CASE

Although both parties litigated this case as though it was a multiple-defendant one hundred count RICO indictment, the facts relative to the State's burden of proof and petitioner's defense at trial are simple and straightforward.

On the night of May 21, 1986, Daniel Linder, hereafter petitioner, and his brother, Greg Linder, drove by pickup truck to a residence in the countryside, Brazos County, wherein Steven Woods was quartering and arrested him. Contemporaneous with the re-arrest of the complainant, the principal on a bail bond that had been forfeited by a court of law, petitioner displayed a shotgun and a night stick, although the latter was disputed, used handcuffs to restrain the complainant, and then, immediately transported him to the Brazos County Jail where a deputy sheriff took custody of the prisoner. (R. II. 10, *et seq.*; 57, *et seq.*; 250, *et seq.*).

The defense of mistake of fact was not offered and included in the jury instruction. If it had been, the evidence would have been insufficient to cradle and maintain the State's burden of disproving the defense of *mistake of fact* beyond a reasonable doubt.

A jury found petitioner guilty. Punishment was assessed at two years probation. An appeal was taken to the 10th Court of Appeals, Waco, Texas, which affirmed and the Texas Court of Criminal Appeals denied review. *Linder v. State*, 734 S.W.2d 168 (Tex.App.--Waco 1987, pet. ref'd). That opinion is reproduced as Appendix A.

The Writ request was denied on November 4, 1992. See Appendix C.

This petition is being filed with the Clerk of this Court within ninety (90) days after entry of the Texas Court of Criminal Appeals' judgment and is timely. Supreme Court Rules 13.1 and 13.4.

REASONS FOR GRANTING THE WRIT

Under *Strickland*[1] a defendant must identify acts or omissions of counsel that are alleged not to have been the result of a reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified act(s) or omission(s) were outside the range of professionally competent assistance. Ultimately, the defendant must show there was a reasonable probability, but for counsel's unprofessional errors, that the

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1. *Strickland v. Washington*, 466 U.S. 68, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

As is often the case in those situations where a viable defense has not been raised, the dereliction is because the attorney is not familiar with the defense or, if he is, has not adequately investigated the facts of the matter. *See, e.g., Brooks v. Texas*, 481 F.2d 619 (5th Cir. 1967) (insanity); *Smotherman v. Beto*, 267 F.Supp. 579 (M.D. Tex. 1967) (insanity); *United States v. Fessel*, 531 F.2d 1275 (5th Cir. 1976) (insanity); *Gomez v. Beto*, 462 F.2d 596 (5th Cir. 1972) (alibi).

Section 8.02(a), Penal Code, requires introduction of evidence that defendant actually formed a particular belief before the defensive issue is raised. Mistake of fact is defined in the Texas Penal Code § 8.02 (Vernon 1974) as follows:

> (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if *his mistaken belief* negated the kind of culpability required for the commission of the offense.
>
> (b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the facts were as *he believed*.

It is obvious from the above stated definition that the mistake of fact defense is based solely on the mistaken belief of *the actor*. It looks to the conduct of others only to the extent that such conduct *contributes to the actor's mistaken*

belief, and does not look at all to the belief or state of mind of any other person. *Montgomery v. State*, 588 S.W.2d 950 (Tex. Cr. App. 1979); *Lasker v. State*, 573 S.W.2d 539 (Tex. Cr. App. 1978).

The defense of mistake of fact is a defense only if "his mistaken belief negated the kind of culpability required for commission of the offense" and only where that mistake has led to a reasonable belief concerning that fact. *Green v. State*, 566 S.W.2d 578 (Tex. Cr. App. 1978) (in a prosecution for a public lewdness, 21.07, in a public place, there is no defense of mistake of fact as to whether the place is a public place since it is not an element that the defendant know that it is a public place). Ergo, by its very terms, § 8.02 involves a mistaken belief that negates culpability. *Jackson v. State*, 646 S.W.2d 225 (Tex. Cr. App. 1983). The Waco court of appeals found petitioner believed that the arrest warrant that he possessed for the bail-bond principal was lawful and because his "sole intent was to assume lawful control" of such principal (but he failed to realize that the law required him to specifically named in the arrest warrant). *Linder*, 779 S.W.2d at 522.

The record is crystal clear that petitioner formed a reasonable belief, viz, that the arrest warrant that he possessed for the complainant was lawful and that his sole intent was to assume lawful control of the complainant thereby negating the culpability required to commit the offense. (R. II. 242, *et seq.*, 245, 258, 292).

The record is replete with conduct of others that contributed to the petitioner's mistaken belief.

(a) The Robertson County District Attorney, Jimmie McCullough, allowed the petitioner to

re-arrest principals who had forfeited their bail if he acted reasonably. Mr. McCullough also allowed the petitioner to use handcuffs. (R. II. 139, *et seq.*) (This testimony came in by bill of exception; however, the trial court later allowed the same testimony over objection.) (R. II. 262);

(b) Prior to the incident that gave rise to the indictment herein, petitioner had delivered over to the Sheriff of Brazos County, in the preceding two years, maybe ten (10) bond jumpers *by the same method*. (R. II. 262);

(c) Petitioner's Exhibit Three, a report of case disposition reflected, along with testimony, that he and Christopher H. Collins had been arrested in McLennan County, Waco, Texas, on or about October 25, 1985, for reckless conduct, viz, arresting one who had jumped bail. The District Attorney's Office of McLennan County disposed of the matter by saying that your petitioner and Collins were acting in good faith, which was premised on *Taylor v. Naighten (sic) Taintor*, 21 L.Ed. 287 (1873). (R. II. 277);

(d) On another occasion Charlie Owens, deputy sheriff for Brazos County, had *tipped* petitioner about a bond jumper in San Antonio. Petitioner went to San Antonio, arrested the man, and brought him directly back to Bryan, Texas and turned him over to Owens, handcuffed. This occurred in the

> middle of the street right in front of Sonny Ellen's office, which is adjacent to the sheriff's department. (R. II. 263, 264).

Although the State had an opportunity to disprove the petitioner's mistake of fact defense beyond a reasonable doubt, viz, rebut the conduct of others that contributed to his mistaken belief, see above, she failed altogether. Cf. *Johnson v. State*, 734 S.W.2d 199 (Tex. App. -- Houston [1st Dist.] 1987).

Trial counsel's flagrant error in failing to perceive, proffer, argue and include in the jury instruction *the defense* amounts to ineffective assistance in the first degree; consequently, but for this error, the trial court would have been under an obligation to direct a verdict of not guilty herein or, if he failed to do so, the court of appeals could have only found the evidence insufficient to sustain the State's burden of disproving the defense beyond a reasonable doubt, viz, an acquittal would have been entered. The prejudice is patent.

Mistake of Law is defined in the Texas Penal Code § 8.03 (Vernon 1974) as follows:

> (a) It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect.
>
> (b) it is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:

(1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

c) Although an actor's mistake of law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the law were as he believed.

It is breathtakingly clear that petitioner relied upon *Taylor v. Taintor*, 21 L.Ed. 287 (1873). (R. II. 112, 245, 249, 262, 263, 264, 265, 274, 294, 303, 304). That opinion by this Court was admitted without objection as defense Exhibit 7. With that said, two burning questions remain, viz, whether petitioner's misplaced perception regarding *Taylor's* applicability is disqualifying? and, if no, (2) is the reliance thereon reasonable? The court of appeals answered the first inquiry in the affirmative.

First, the logic underpinning reliance aside, petitioner's settled belief that *Taylor* was authority was of course, imperfect; however, that *faux pas* enhances his subjective certainty in that an erroneous belief about a law is inherent *in the defense* -- if not, why does it exist? Therefore, the pivotal issue is whether there exists a justifiable, defensible, and excusable conviction, viz, a

reasonable reliance. If that question can be answered positively, then petitioner did not fail to prove his [affirmative] defense by a preponderance of the evidence as no rational trier of fact could have found otherwise.

The same items of evidence set out *supra* caused petitioner to believe he was on solid footing legally.

Items (a) through (d) on pp. 5 & 6 of this writ also support this claim.

The implicit finding of the jury was that petitioner was not reasonably relying upon a mistake of law at the time he rearrested the principal in this case. Therefore, it must be determined whether the evidence when viewed most favorably to the jury's verdict is sufficient to support their implicit rejection of petitioner's affirmative defense of mistake of law. *Schuessler v. State*, 719 S.W.2d 320 (Tex. Cr. App. 1986).

The circumstances of the offense and the life experiences of the petitioner may aid the jury in considering whether he was guiltless at the time he committed an offense. For example, "[a]ttempts to conceal incriminating evidence and to elude officers can indicate knowledge of wrongful conduct." *Graham v. State*, 566 S.W.2d 941 (Tex. Cr. App. 1978). In the case at bar petitioner, after rearresting the principal, immediately turned him over to the Sheriff's Department of Brazos County, Texas. (R. II. 10, *et seq.*; 57 *et seq.*; 250, *et seq.*). Conduct that evinces mea culpa? Not quite.

Is there conflicting evidence in this record on petitioner's affirmative defense? The only morsel of evidence, if that much, offered to rebut, meet or destroy petitioner's posture is a memorandum of law authored by Todd Jermstad, Chairman, Brazos County Bail Bonds Board.

See State's Exhibit 3. Mr. Jermstad was, at the time, an Assistant District Attorney for Brazos County, Texas. The letter in question is an opinion, a memorandum, or whatever, by Mr. Jermstad who *is not a public official charged by law with responsibility for interpreting the law in question.*

The State had ample opportunity to join the issue with *conflicting evidence* but failed. *Cf. Schuessler v. State, supra.*

Petitioner urges the Court to closely examine the claims herein. After that feat is accomplished, only one conclusion can be drawn; Linder has been deprived of the most basic American tenet, viz, acquittal when factually and legally innocent.

CONCLUSION

Petitioner requests that this Court grant his Petition for a writ of Certiorari.

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APPENDIX A
Opinion of the Court of Appeals

Daniel LINDER, Appellant,

v.

The STATE of Texas, Appellee.

No. 10-86-208-CR.

Court of Appeals of Texas,
Waco.

July 9, 1987.

Defendant bail bondsman was convicted in the 85th Judicial District Court, Brazos County, W. T. McDonald, Jr., J., of kidnapping the principal of a bail bond issued by defendant's employer, and he appealed. The Court of Appeals, Hall, J., held: (1) defendant had not validly arrested the principal pursuant to warrant in which defendant was not named; (2) defense of mistake of law was not available pursuant to oral advice from district attorney; (3) motion to quash indictment was not timely and thus resulted in waiver of all but jurisdictional defects; and (4) evidence was sufficient.

Affirmed.

1. Arrest -- 65

Private person must be specially named on arrest warrant to effectuate a valid arrest pursuant to that warrant. Vernon's Ann. Texas C.C.P. arts. 15.01, 15.14, 15.15.

2. Bail -- 80

Absence of bail bondsman's name on arrest warrant rendered unauthorized and invalid his arrest of the principal of a bail bond issued by his employer. Vernon's Ann. Texas C.C.P. arts. 15.01, 15.14, 17.19.

3. Bail -- 80

Bail bondsman's arrest of principal of a bond issued by his employer was not authorized on ground that principal willingly accompanied bail bondsman to sheriff's office, where bail bondsman apprehended principal through coercion and threat of force using a shotgun and handcuffs. Vernon's Ann. Texas C.C.P. art. 17.16.

4. Criminal Law -- 32

Oral advice from district attorney that bail bondsman could arrest bond jumpers and deliver them to the sheriff's office if he acted reasonably did not support affirmative defense of mistake of law, against kidnapping charge, when bail bondsman arrested principal of a bond issued by his employer, pursuant to a warrant in which the bail bondsman was not named. V.T.C.A., Penal Code § 8.03.

5. Indictment and Information -- 139

Motion to quash indictment was not timely and resulted in waiver of all but jurisdictional defects where motion was presented after indictment had been read to the jury, defendant had pleaded to the charges, and the State had rested its primary proof.

6. Indictment and Information -- 196(5,6)

That defendant was charged with two separate offenses in the same charging instrument and that charge "Kidnapping/Aggravated Assault" failed to notify defendant of which charge to be prepared to defend against did not represent jurisdictional defects, so that defendant waived them by failing to file motion to quash prior to trial. V.T.C.A., Penal Code § 3.04.

7. Criminal Law -- 1166.20

Defendant was not harmed by reading to the jury of both charges made in the same indictment, one of which was later abandoned by the State, where the jury would have heard the evidence as presented regardless of whether the indictment had included only one of the offenses.

8. Kidnapping -- 5

Evidence as to defendant's restriction of victim's movement, without his consent, and his preventing liberation by holding victim in a place where he would not be found, or use or threatened use of shotgun, was sufficient to sustain conviction for kidnapping in prosecution of bail bondsman who arrested principal on a bond issued by his employer pursuant to a warrant in which the bail bondsman was not named. V.T.C.A., Penal Code §§ 20.01(1, 2), 20.03.

9. Kidnapping -- 2

Affirmative defense of sole intent to assume lawful control over victim was not available in kidnapping prosecution absent evidence that defendant and victim were relatives. V.T.C.A., Penal Code § 20.03.

10. Kidnapping -- 1

Kidnapping statute does not require threat of deadly force to be used against potential rescuers, only that threat be used against the one who is abducted. V.T.C.A., Penal Code § 20.01.

Gordon R. Cooper, II, Cooper & Cooper, Houston, for appellant.

Bill R. Turner, Dist. Atty., Annette K. Hanna, Asst. Dist. Atty., Bryan, for appellee.

HALL, Justice.

Pleading not guilty, appellant Daniel Linder was found guilty by a jury for the kidnapping of Steven Woods, the principal of a bail bond issued by appellant's employer. Punishment was assessed by the court at confinement in the Texas Department of Corrections for a period of two years, probated.

Appellant was a licensed bail bondsman in Brazos County. Occasionally he did side-line work for Sonny Ellen's bonding company. In this latter capacity, appellant wrote bail bonds and re-arrested principals of bonds who failed to appear in court. In the case before us, appellant was found guilty of kidnapping when he re-arrested Steven Woods who was the principal of a bail bond issued by Sonny Ellen's bonding company. As was the usual practice, Mr. Ellen had given appellant a copy of an arrest warrant that Ellen had received from the Brazos County Sheriff's Office when Woods failed to appear in court. Armed with this arrest warrant, appellant proceeded with his brother to Woods' residence to apprehend Woods and surrender him to the sheriff's department. When appellant arrived at Woods'

residence, he shined the high beams of the headlights of his truck on the door of Woods' trailer house to prevent Woods from seeing who was outside, and honked his horn. When Woods emerged from the trailer house and approached appellant's truck, appellant, armed with a 12-gauge shotgun and handcuffs, got out of the truck along with his brother and told Woods he was under arrest. Appellant then handcuffed Woods and drove him to the Sheriff's Office where Woods was booked into jail by a deputy sheriff.

Appellant contends through seven points of error that his arrest of Woods was valid, even though he was not specially named in the warrant to make the arrest. We overrule these contentions, and we affirm the judgment.

In point of error number one, appellant contends the trial court erred in refusing to grant his motion for instructed verdict since he arrested Woods pursuant to an arrest warrant authorizing the arrest of Woods.

When a surety seeks to surrender a principal of a bail bond he must comply with articles 17.16 and 17.19 of Vernon's Ann.C.C.P. Article 17.16 provides: "Those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted." Article 17.19 provides: "Any surety, desiring to surrender his principal, may upon making affidavit of such intention before the court or magistrate before which the prosecution is pending, obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases."

These statutes have been interpreted by our Court of Criminal Appeals to provide two methods by which a surety may surrender his principal: article 17.16 allows surrender

of a principal without a warrant "if the principal will surrender willingly and without the use of force"; if not, the surety must comply with article 17.19 and secure a warrant of arrest for the principal. *Austin v. State*, 541 S.W.2d 162, 165 (Tex.Cr.App. 1976). Appellant argues he satisfied the requirements of article 17.19 in that he had an arrest warrant for Woods, and that the fact that he was not specially named to execute the warrant was merely an error of form and not substance, which did not invalidate the arrest.

[1,2] However, articles 15.01, 15.14 and 15.15 of the Code of Criminal Procedure provide the necessary requirements for a private person to be granted authority to make a valid arrest pursuant to a warrant. Article 15.01 prescribes that if someone other than a police officer is to execute the warrant he must be specially named. Article 15.14 provides:

> If it is made known by satisfactory proof to the magistrate that a peace officer cannot be procured to execute a warrant of arrest, or that such delay will be occasioned in procuring the services of a peace officer that the accused will probably escape, such warrant may be directed to any suitable person who is willing to execute the same; and in such case, *his name shall be set forth in the warrant.*

(Emphasis added). Article 15.15 of the Code provides that when a private person undertakes proper authority to execute a warrant, he then has the same liabilities and rights as apply to peace officers. It is apparent from a reading of these statutes that a private person must be specially named on the arrest warrant to effectuate a valid arrest pursuant to that warrant. *Hernandez v. State*, 600 S.W.2d 793, 795 (Tex.Cr.App. 1980); *Stephenson v. State*, 93 Tex.Crim. 578, 249 S.W. 492, 493 (1923). Therefore, the absence of

appellant's name on the arrest warrant rendered appellant's arrest of Woods unauthorized and invalid.

[3] Appellant further contends that the arrest of Woods falls under the authority of article 17.16 of the Code of Criminal Procedure in that Woods willingly accompanied him to the sheriff's office. This argument has no merit because appellant apprehended Woods through coercion and threat of force using a 12-gauge shotgun and handcuffs. Point of error number one is overruled.

Closely related to point of error number one, appellant's seventh point asserts that the trial court erred in refusing to grant appellant's requested instruction to the jury. The requested instruction read:

> You are instructed that you must find beyond a reasonable doubt that the Defendants re-arrested the alleged victim knowing that their prior practice with the sheriff's office at Brazos County and other counties in Texas of rearresting bail jumpers without a warrant made out in their name was no longer acceptable to the Sheriff.

In support of this contention, appellant relies heavily on a historic United States Supreme Court case that construed the common law as authorizing sureties to arrest principals without an arrest warrant. *Taylor v. Taintor*, 88 U.S. (16 Wall) 287, 21 L.Ed. 287 (1873). However, the common law rule as pronounced in *Taylor* is not the law in Texas since statutory guidelines have been promulgated and interpreted by Texas' courts to define the law as it applies to sureties who seek to surrender principals. Vernon's Ann.C.C.P. articles 17.16, 17.19; *Austin*, 541 S.W.2d at 165. Appellant's seventh point is overruled.

In point of error two, appellant complains that the trial court erred by refusing to hear testimony from the District Attorney for Robertson County by which appellant sought to establish the affirmative defense of mistake of law according to V.T.C.A., Penal Code, article 8.03.

[4] Article 8.03 of the Penal Code provides the affirmative defense of mistake of law if the defendant can establish that he reasonably believed his conduct did not constitute a crime and that he reasonably relied upon:

> (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

Through a bill of exceptions, appellant established that the District Attorney for Robertson County "told" appellant that it was all right in that county for appellant to arrest bond jumpers and deliver them to the Sheriff's Office if appellant acted "reasonably" in making the arrests. However, no evidence of a written document as required by article 8.03 of the Penal Code was introduced, only that oral permission had been granted. There being no error, point of error number two is overruled.

Appellant complains in point three against the trial court's refusal to grant his motion to quash the indictment.

The indictment asserted two offenses against appellant in two separate counts. The first count charged kidnapping, and the second charged aggravated assault. Both counts were

read to the jury at the opening of trial, and appellant pleaded not guilty to both counts as charged. After the State rested its case-in-chief, the appellant presented his motion to quash the indictment. The motion was overruled by the trial court after a hearing held in chambers. Immediately after this ruling, the State abandoned the second count of the indictment. The charge of the court to the jury presented only the offense of kidnapping.

[5] Appellant asserts the trial court's refusal to grant his motion to quash the indictment was error. We overrule this complaint. Appellant did not present his motion to quash the indictment prior to trial but waited until after it had been read to the jury, he had pleaded to the charges, and the State had rested its primary proof. Because of this, appellant's complaints to the indictment were not timely and resulted in a waiver of all but jurisdictional defects in the indictment. *Dennis v. State*, 647 S.W.2d 275, 278-79 (Tex.Cr.App. 1983).

[6] Appellant complains of several defects in the indictment: (1) that he was charged with two separate offenses in the same charging instrument, that those offenses should have been severed according to Penal Code section 3.04, and that the reading of both charges to the jury worked a prejudice against him; and, (2) that the charge "Kidnapping/Aggravated Assault" failed to notify appellant of which charge to be prepared to defend against. These complaints do not represent jurisdictional defects, therefore, if errors were present in the indictment, appellant waived them by failing to file his motion to quash prior to trial.

[7] Appellant further asserts he was harmed by the reading of both charges to the jury, however, the jury would have heard the evidence as presented regardless of whether the indictment had included only one or both of the offenses.

[8] In point of error number four appellant complains that the trial court erred by refusing to grant his motion for instructed verdict because there was insufficient evidence to prove the essential elements of the offense of kidnapping.

Section 20.03 of the Penal Code defines kidnapping as follows: "A person commits an offense if he intentionally or knowingly abducts another person." "Abduct" is defined in section 20.01(2) as meaning "to restrain a person with intent to prevent his liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force." Section 20.01(1) of the Code defines the term "restrain" to mean:

> to restrict a person's movements without consent, so as to interfere substantially with his liberty, by moving him from one place to another or by confining him. Restraint is "without consent" if it is accomplished by: (A) force, intimidation, or deception; or (B) any means, including acquiescence of the victim, if he is a child less than 14 years of age....

Particularly, appellant complains the State failed to produce evidence to prove that appellant restricted Woods' movement, without his consent, by either moving him from one place to another or confining him. He also argues that there was no evidence to show Woods' liberation was prevented by holding him in a place where he would not be found, or that the appellant used the shotgun on Woods, or threatened him with the shotgun.

We hold the evidence was sufficient to support the conviction of kidnapping. In apprehending Woods, appellant displayed a shotgun, placing Woods in fear, and then he

placed Woods in handcuffs and moved him without his consent from his place of residence to the Sheriff's Office. Appellant's point of error number four is overruled.

In point of error number five appellant appears to allege that the court erred in refusing to grant his instructed verdict after both sides had closed in that he had proven the statutory affirmative defense to kidnapping.

[9] The affirmative defense to kidnapping is set forth in section 20.08 of the Penal Code as:

> (b) It is an affirmative defense to prosecution under this section that: (1) the abduction was not coupled with intent to use or to threaten to use deadly force; (2) the actor was a relative of the person abducted; and (3) the actor's sole intent was to assume lawful control of the victim.

Appellant provided no evidence that Woods and appellant were relatives, therefore, this affirmative defense is not available for any purpose in this matter. We overrule point of error number five.

[10] In point of error number six appellant asserts the trial court committed error when it refused to include the following requested definition of "liberation" in the jury charge:

> You are hereby instructed that to prevent a person from being liberated means to prevent him from being rescued by others, such as his spouse, relatives, friends, law enforcement authorities and any liberators by: a. Hiding him in a place where is rescuers are not likely to find him; or b. Using or threatening the use of deadly force against his rescuers.

We hold the requested charge was properly refused. Section 20.01 of the Penal Code provides no language which would indicate that a threat of deadly force must be used against potential rescuers, only that the threat be used against the one who was abducted. Point of error number six is overruled.

The judgment is affirmed.

APPENDIX B

Daniel LINDER, Appellant,

v.

The STATE of Texas, Appellee.

No. 10-89-085-CR.

Court of Appeals of Texas,
Waco.

Oct. 26, 1989.
Discretionary Review Refused
Feb. 7, 1990.

After defendant's kidnapping conviction was affirmed on appeal, 734 S.W. 2d 168, defendant petitioned for writ of habeas corpus. The 85th Judicial District Court, Brazos County, W.T. McDonald, Jr., J., denied writ, and defendant appealed. The Court of Appeals, Means, J., held that evidence was insufficient to establish that defendant reasonably relied on 1873 case that authorized his arrest of principal on bail bond without being specifically named in arrest warrant, for purposes of his mistake of law defense.

Affirmed.

1. Criminal Law -- 641.13(2)

Defense counsel's failure to assert mistake of fact defense was not ineffective assistance in kidnapping prosecution arising when defendant, as bonding company employee, attempted to rearrest principal on bail bond; defendant's belief that arrest warrant was valid was result of

mistake of law, and defense counsel presented evidence that defendant thought he was assuming lawful control over principal. V.T.C.A., Penal Code §§ 2.04(d), 8.02, 8.02(a), 20.03; U.S.C.A. Const. Amend. 6; Vernon's Ann. Texas C.C.P. arts. 15.01, 15.14, 15.15.

2. Criminal Law -- 569

Evidence was insufficient to establish that defendant reasonably relied on 1873 case that authorized his arrest of principal on bail bond without being specifically named in arrest warrant, for purposes of his mistake of law defense in kidnapping prosecution; evidence indicated that bonding company for which defendant was working had received letter from chairman of county bail bond board stating that case no longer was law in Texas, and that defendant should have known that Code of Criminal Procedure set out rules and guidelines for him to follow. V.T.C.A., Penal Code §§ 8.03, 8.03(b), 8.03 comment.

Ken J. McLean, Houston, for appellant.

Bill R. Turner, Crim. Dist. Atty., Bryan, for appellee.

OPINION

MEANS, Justice.

Daniel Linder was convicted by a jury of the offense of kidnapping. His appeal of the conviction to this court was affirmed and the Court of Criminal Appeals denied his petition for discretionary review. *See Linder v. State*, 734 S.W.2d 168 (Tex.App. -- Waco 1987, pet. ref'd). Now he appeals from the trial court's denial of a writ of habeas corpus.

Appellant's conviction arose out of his attempted re-arrest of a principal on a bail bond who failed to appear in court. Appellant was a licensed bondsman, and was "moonlighting" for a bonding company at the time of the offense.

Although Appellant had the benefit of a three-day trial, an appeal presenting seven points of error, and a petition for discretionary review raising two grounds, he now brings this appeal complaining that because his trial counsel rendered ineffective assistance the trial court should have granted him a writ of habeas corpus.

In making this claim, Appellant has the burden of showing this his counsel's performance was so deficient that he was not functioning as counsel within the sixth amendment guarantee. *See* U.S. Const. amend. VI; *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Reviewing courts are to make a strong presumption that the attorney rendered reasonable professional assistance and that his actions constituted sound trial strategy. *Id.* 104 S.Ct. at 2065-66. In determining whether Appellant's counsel afforded him reasonable representation, we must look at the totality of the representation rather than the isolated acts or omissions of trial counsel. *See Miller v. State*, 728 S.W.2d 133, 135 (Tex.App. -- Houston [14th Dist.] 1987, pet. ref'd). Appellant was prejudiced only if a reasonable probability exists that the outcome would have been different if he had been afforded reasonable professional assistance. *See id.*

[1] In his first complaint, Appellant asserts he was denied effective assistance because his trial counsel failed to

assert the defense of mistake of fact. Section 8.02 of the Texas Penal Code provides:

> It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense.

TEX.PENAL CODE ANN. § 8.02(a) (Vernon 1989). The culpability required for the commission of kidnapping is that the person intentionally or knowingly abducted another person. *See id.* at § 20.03. Appellant contends that culpability was negated in his case because he believed that the arrest warrant that he possessed for the bail-bond principal was lawful and because his "sole intent was to assume lawful control" of such principal.

The statement of facts from the trial clearly shows that Appellant believed this to be the case because he failed to realize that the law required him to be specifically named in the arrest warrant. *See* TEX. CODE CRIM. PROC. ANN. arts. 15.01, 15.14, 15.15 (Vernon 1977). Appellant is attempting to transform a mistake-of-law defense into a mistake-of-fact defense. While there is some gray area between the two defenses, Appellant's belief that the warrant was valid was the result of his mistaken understanding of the law. Throughout the trial, he attempted to prove that he had relied on the Supreme Court case of *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1873) in making the arrest. As this court pointed out in the first appeal of this case, *Taylor* is no longer the law in Texas, and bail bondsmen must follow the guidelines of the Code of Criminal Procedure. *Linder*, 734 S.W.2d at 171.

Assuming, without deciding, that mistake of fact was a possible defense for Appellant, his trial counsel, at the very least, turned in a reasonably professional performance in defending Appellant. On many occasions, the jury heard testimony that Appellant thought he was assuming lawful control over the principal. His counsel requested and obtained a mistake-of-law instruction to be placed in the charge. Viewing the total representation of Appellant, we cannot say that he was denied effective assistance of counsel because the defense of mistake of fact was never presented. Appellant's first complaint is overruled.

[2] Appellant's second and third complaints assert that the evidence at trial was insufficient to support the jury's rejection of his affirmative defense of mistake of law, and that his trial counsel failed to articulate this insufficient-evidence point to this court and to the Court of Criminal appeals. Mistake of law is an affirmative defense that must be raised and proved by a preponderance of the evidence. *See* TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1974); *Austin v. State*, 541 S.W.2d 162, 166 (Tex.Crim.App. 1976). Even though these complaints involve ineffective assistance of counsel at the appellate level, rather than the trial level, we will use the same *Strickland* standard in reaching our conclusion. *See Bowen v. Foltz*, 763 F.2d 191, 195 (6th Cir. 1985) (Contie, J., dissenting).

As Appellant admits, his attorney presented the mistake-of-law affirmative defense to the jury by requesting and obtaining an instruction on mistake of law. The jury, however, rejected this defense. The affirmative defense of mistake of law applies only if the defendant can establish that he *reasonably* believed his conduct did not constitute a crime and that he *reasonably* relied upon:

> (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
>
> (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

TEX. PENAL CODE ANN. § 8.03(b) (Vernon 1989). At trial, Appellant presented much evidence on why his knowledge of the law was mistaken: 1) a district attorney had allowed him to rearrest principals; 2) he had rearrested approximately ten "bond jumpers" the same way; 3) another district attorney disposed of a similar matter merely by stating that Appellant had acted in good faith, relying on the *Taylor* case; and 4) a sheriff had tipped Appellant on the whereabouts of a bond jumper, whom Appellant arrested much the way he did the principal in this case. However, none of these are reasons which section 8.03 allows to justify a mistake of law. *See Lewis v. State*, 124 Tex. Crim. 582, 64 S.W.2d 972(1933). Appellant tries to make section 8.03 apply by saying that he relied on the *Taylor* case which qualifies as a "written interpretation of the law combined in an opinion of a court of record," and that the above-listed evidence proves this reliance. Assuming that Appellant did rely on *Taylor*, he failed to show that such reliance was reasonable. Section 8.03 was not designed to allow one to rely on "old interpretative opinions, opinions that conflict with others, or on overruled opinions." Searcy & Patterson, *Practice Commentary*, TEX. PENAL CODE ANN. § 8.03 (Vernon 1974). *Taylor* is an 1873 decision concerning the liability of a bondsman on a bond made in Connecticut. As a licensed bail bondsman, Appellant cannot relieve himself from keeping up with the current law in his field merely by

asserting he relied on *Taylor*. He should have known that the Texas Code of Criminal Procedure sets out rules and guidelines for him to follow and that there may exist later cases on the subject. In fact, the evidence shows that the bonding company he was working for at the time of this offense had received a letter from the chairman of the Brazos County Bail Bond Board stating that he believed *Taylor* was no longer the law in Texas. That Appellant got away with this type of activity in the past is not proof of reasonable reliance on *Taylor*.

Because neither the record nor Appellant's arguments show that his reliance on *Taylor* was reasonable, or that he had any other basis for a mistake-of-law affirmative defense, his counsel did not render ineffective assistance. Clearly, his counsel considered all of this at the time he prepared for appeal, and that is why he framed the points the way he did. Appellant's second and third complaints are overruled, and the trial court's denial of Appellant's application for writ of habeas corpus is affirmed.

APPENDIX C

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Writ No. 22,812-02 AUSTIN

STYLE: Daniel Linder NOV.-6'92
TRIAL COURT NO:

TX
November 4, 1992

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P O BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: KEN J. MCLEAN
1900 N LOOP WEST SUITE 500
HOUSTON TX 77018